APPEAL NO. 92727

This appeal arises under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1993). A contested case hearing was originally held on July 24, 1992, in (city), Texas with (hearing officer) presiding. The issue was whether the claimant was entitled to receive temporary income benefits (TIBS) from December 18, 1991 through April 1, 1992 inclusive. The hearing officer found that the claimant's treating physician had certified maximum medical improvement (MMI) on December 18, 1991, with a whole body impairment rating of zero percent and no objective evidence of neck problems resulting from a work-related injury. The hearing officer accordingly held that the claimant was not entitled to receive TIBS after December 18, 1991. This panel reversed and remanded for consideration of the reports of the claimant's subsequent doctors, because it appeared that the hearing officer had only considered the medical evidence arising from claimant's treating doctor. Texas Workers' Compensation Commission Appeal No. 92433, decided September 28, 1992.

A hearing on remand was held on October 28, 1992. In his decision and order, the hearing officer noted that all evidence and testimony in the record from the original hearing continued to be a part of the record for the remanded hearing, and that he considered all of the medical evidence in the record. The hearing officer again determined that the claimant reached MMI on December 18, 1991, with a whole body impairment rating of zero percent, pursuant to the treating doctor's certification. He accordingly entered an order that claimant was not entitled to TIBS after December 18, 1991.

In her request for review the claimant contends that the first MMI certification was determined prematurely, and she urges that the two MMI reports pertained to two different injuries--the second being a reinjury suffered during physical therapy. The carrier responds that there is sufficient probative evidence to support the hearing officer's decision; it also argues that claimant's request for review is untimely.

DECISION

Because the claimant's request for review was not filed within the statutorily required time period, we find that the decision and order of the hearing officer became final by operation of law.

The 1989 Act requires that a party that desires to appeal the decision of the hearing officer shall file a written appeal with the Appeals Panel not later than the 15th day after the date on which the decision of the hearing officer is received from the Division of Hearings. Article 8308-6.41(a). The decision of the hearing officer is final in the absence of a timely appeal by a party. Article 8308-6.34(h).

The record in this case discloses that the hearing officer's decision was distributed on December 10, 1992. Rules of the Texas Workers' Compensation Commission, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) provide that for purposes

of determining the date of receipt for notices and other written communications which require action by a date specific after receipt, the Commission shall deem the received date to be five days after the date mailed. In addition, Rule 143.3(c) provides that a request for review of the decision of the hearing officer shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and received by the Commission or other party not later than the 20th day after the receipt of the hearing officer's decision. We observe that the record in the case below shows that the hearing officer, at the conclusion of the hearing, advised the parties of the statutory requirements for appeal of his order.

Claimant's request for review stated she received the decision and order "on 12-26-92 because I was away on vacation." This situation is analogous to an earlier considered one by this panel which effectively held that the response time for carrier's attorney began to run on the day following the date the document was received in his office--not the day after he personally received it. Texas Workers' Compensation Commission Appeal No. 92079, decided April 14, 1992.

In this case, the claimant's request for review, which was dated December 30, 1992, was certified as personally served on carrier's attorney on December 31, 1992. The date stamp on the document indicates it was also received by the Commission on December 31, 1992. Applying the statute and the rules to these facts, the claimant's request for review was not timely.

We have examined the record in this case as if the appeal were timely and have determined that we would have affirmed the hearing officer's decision.

Basically, claimant, a rehab technician, suffered a compensable injury on (date of injury) when lifting a patient. Beginning October 10, 1991, she started seeing doctors at a minor emergency center, including (Dr. C), for neck and shoulder pain. (She had originally been seen by another doctor.) On December 18, 1991, Dr. C released claimant to regular work and also recommended claimant finish physical therapy. On that date Dr. C also certified MMI with a zero percent whole body impairment rating due to her shoulder injury. His Report of Medical Evaluation (Form TWCC-69) also stated he found no objective evidence of neck problems resulting from a work-related injury.

The claimant did not disagree with Dr. C's certification of MMI for her shoulder, but she contended that she continued to have neck problems. In January of 1992 she went to another doctor, (Dr. M), who diagnosed cervical strain-rotator cuff injury, released her to modified duty with lifting restrictions, recommended physical therapy, and certified MMI with zero percent impairment on April 1, 1992.

This case presented the question of which of two different doctors' reports, each of which has certified MMI and assigned impairment, albeit on different dates, should prevail. Possibly because the proper procedures were not followed, no designated doctor was

appointed to resolve claimant's dispute with her treating doctor's assessment. Under these circumstances, the hearing officer was entitled to review all the medical evidence in the case in making his determination.

On remand, the hearing officer clearly considered both the reports of Drs. C and M, and opted to find the former of greater weight. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The Act requires that MMI and impairment be based upon medical evidence: "reasonable medical probability" in the case of MMI (Article 8308-1.03(32)(A)), and "objective clinical and laboratory finding[s]" in the case of impairment (Article 8308-4.25(a)). There was sufficient medical evidence, in the form of Dr. C's report, to support the hearing officer's determination. We will not overturn the decision of the hearing officer unless it is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The claimant contended that Dr. C's certification of MMI was only for a portion of her injury, and that thus she was entitled to further income benefits after December 18, 1991 because of problems with her neck. We note that the medical evidence shows Dr. C and another doctor at the same facility treated complaints of both neck and shoulder pain during the period October through December. Dr. C clearly considered and addressed any possible residual problems with claimant's neck when he certified MMI. We would further point out that this panel has ruled that MMI does not necessarily mean that an individual is free of pain or fully restored to his or her preinjury condition. Texas Workers' Compensation Commission Appeal No. 92270, decided August 6, 1992. When a doctor finds MMI and assesses impairment he agrees, in effect, that the injured worker is likely to continue to have effects, and quite possibly pain from the injury. However, he has determined, based upon his medical judgment, that there will likely be no further substantial recovery from the injury. Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993.

We hold that the decision and order of the hearing officer have become final by operation of law.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge